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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/524,369	10/31/2005	Joan Schnieber	02280.003300.	9845
5514 7590 01/05/2011 FITZPATRICK CELLA HARPER & SCINTO 1290 Avenue of the Americas NEW YORK, NY 10104-3800				
EXAMINER				
GWARTNEY, ELIZABETH A				
ART UNIT		PAPER NUMBER		
1781				
MAIL DATE		DELIVERY MODE		
01/05/2011		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/524,369

Applicant(s)

SCHNIEBER ET AL.

Examiner

ELIZABETH GWARTNEY

Art Unit

1781

Period for Reply -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 22 December 2009.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-3,6-11,13 and 19 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-3,6-11,13 and 19 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-945)
- 3) ☒ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date 10091222
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicants' submission filed on 22 December 2009 has been entered.
2. Claims 4,5 and 14-18 have been cancelled and claim 19 has been added. Claims 1-3, 6-11, 13 and 19 are pending.
3. The previous rejections under 35 U.S.C. §112, 1st paragraph and 2nd paragraph have been withdrawn in light of Applicants' submission filed on 22 December 2009.

Claim Rejections - 35 USC § 112

4. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

5. Claim 19 is rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

Claim 19 includes the limitation "wherein said edible core is selected from the group consisting of frozen jelly, frozen yogurts, frozen tomato sauces, and mixtures thereof."

However, while there is support in the specification for a process step including the freezing of

the edible core prior to coating, there is no support wherein the edible core is selected from the group consisting of "frozen jelly, frozen yogurt, frozen tomato sauces, and mixtures thereof."

Claim Rejections - 35 USC § 102

6. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

7. Claims 1-3 and 6-10 are rejected under 35 U.S.C. 102(b) as being anticipated by Given et al. (US 4,888,187).

Regarding claims 1-3 and 10, Given et al. disclose a method of making a shelf stable edible confectionery bar (Abstract, C6/L27-29) comprising the steps of: (A) providing a natural fruit center having an outside surface (i.e. core) (see fruit core center cylindrical or related shape - Abstract, C3/L51-55); (B) applying a soft edible layer that encapsulates the outside surface of said natural fruit center (Abstract, C3/L59-65); wherein the said soft edible layer is applied by a method comprising the steps of: (a) coating the outside surface of the natural fruit center with caramel (i.e. base liquid) (Abstract, C3/L59-60); (b) applying chopped nuts to caramel coated natural fruit center (Abstract, C3/L60-61); and (c) cooling the coated natural fruit center to set the compound coating (i.e. drying - C7/L19-20/Example 1).

Given that Given et al. disclose a confectionery bar with a water activity level of less than 0.5 at 25°C (Abstract), it is clear that the soft edible layer component of the confectionery bar would inherently have a water activity of less than 0.5 at 25°C.

Further, given that Given et al. disclose a soft edible layer identical to that of the present invention, it is clear that it would inherently have a hardness value of 6 or less as determined by Descriptive Analysis Testing in ASTM MNL13.

Regarding claims 6-7, Given et al. disclose all of the claim limitations as set forth above and wherein the base liquid comprises corn syrup (C6/L44-46) and the dry component is nuts (i.e. protein and fat based) (Abstract, C3/L59-60).

Regarding claim 8, Given et al. disclose all of the claim limitations as set forth above and that the nuts comprise salt (see salted peanuts – C7/Example 2).

Regarding claim 9, Given et al. disclose all of the claim limitations as set forth above and that the nuts are roasted and salted peanuts (C7/Table 3). Given that Given et al. disclose roasted peanuts, it is clear that inherently the peanuts were treated to a roasting step.

Claim Rejections - 35 USC § 103

8. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

9. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.

4. Considering objective evidence present in the application indicating obviousness or nonobviousness.
10. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).
11. Claim 13 is rejected under 35 U.S.C. 103(a) as being unpatentable over Given et al. (US 4,888,187).

Regarding claim 13, Given et al. disclose all of the claim limitations as set forth above. While Given et al. a shelf stable confectionery cylindrical in shape and having a linear dimension of about 6 to 7.5 cm (C7/Example 1), the reference does not explicitly disclose that the confectionery is bite sized.

Since the instant specification is silent to unexpected results, it would have been obvious to one of ordinary skill in the art at the time of the invention to have changed the size of the confectionery bar. Change in **size** is not patently distinct over the prior art absent persuasive evidence that the particular configuration of the claimed invention is significant. See *In re Rose*, 220 F.2d 459, 105 USPQ 237 (CCPA 1955); *In re Rinehart*, 531 F.2d 1048, 189 USPQ 143 (CCPA 1976); *In re Dailey*, 357 F.2d 669, 149 USPQ 47 (CCPA 1966). MPEP 2144.04[R-1]

12. Claim 11 is rejected under 35 U.S.C. 103(a) as being unpatentable over Given et al. (US 4,888,187) in view of Beharry (WO 02/11554) and Yoon (US 4,563,363).

Regarding claim 11, Given et al. disclose all of the claim limitations as set forth above. Given et al. does not disclose wherein the edible core is comprised of peanut butter and said soft edible layer is jelly.

Beharry teach a snack bar having a nut spread filling (i.e. peanut butter) (Abstract, p.2/L11-13, p.3/L18-23) enrobed with a fruit flavored coating (p.8/L19-30).

Yoon teach a jelly enrobed confectionery product (Abstract). Yoon teach coating confectionery with a jelly layer comprising sugar, a gelling agent such as agar, pectin or carageenan, and water (C4/L20-C5/L5). Yoon teach that the jelly confectionery product has a soft gummy taste, i.e. texture (C4/L9-11).

Given et al., Beharry and Yoon are combinable because they are concerned with the same field of endeavor, namely, filled and coated confectionery products. It would have been obvious to one of ordinary skill in the art at the time of the invention to have used a peanut butter core as taught by Beharry and jelly coating, as taught by Yoon, for the confectionery bar of Given et al. for the purpose of making a peanut flavored confection with a soft and gummy textured coating.

Further, while Yoon does not explicitly teach a fruit flavored jelly coating, since jelly is known to be flavored, it would have been obvious to one of ordinary skill in the art to have flavored the jelly of Yoon any flavor, including fruit flavor, and arrive at the present invention.

8. Claim 19 is rejected under 35 U.S.C. 103(a) as being unpatentable over Given et al. (US 4,888,187) in view of Lennox (US 6,318,112).

Regarding claim 19, Given et al. disclose all of the claim limitations as set forth above. While Given et al. disclose a natural fruit core including cooked fruit puree, i.e. jelly, (Abstract, C5/L5-20), the reference is silent with respect to frozen jelly.

Lennox teaches that is was known to coat liquids onto core food pieces using freeze coating (Abstract, C3/L1-14). Lennox teaches that the freeze coating process involves a repeating cycle of chilling core pieces of product with liquid nitrogen or carbon dioxide and then spraying on a thin layer of liquid coating (C3/L1-14).

Given Lennox teaches that is was know to coat liquids onto core food pieces using freeze coating, i.e. frozen core pieces, it would have been obvious to one of ordinary skill in the art to have coated the natural fruit core of Given et al. using any coating method, including freeze coating, and arrive at the present invention.

Response to Arguments

9. Applicants' arguments, see Remarks and Declaration of Lisa C. Swanson under 37 C.F.R. §1.132, filed 22 December 2009, with respect to claims 11-12 have been fully considered and are persuasive. The rejection of claims 11-12 **under 35 C.F.R. §112, 2nd paragraph** has been withdrawn.

10. Applicants' arguments filed 22 December 2009 have been fully considered but they are not persuasive.

Applicants state "[c]ontrary to the Examiner's assertions, Given, on the other hand, does not disclose a soft edible layer of caramel created in situ by layering liquid and dry components.

One skilled in the art would understand that the caramel of Given has already been created by a conventional method, and the act of applying chopped nuts onto the caramel layer of the snack bar simply results in a caramel with nuts on top.” Applicants argue that “Given does not disclose or suggest the forming of caramel by the combination of at least one liquid ingredient of the caramel and at least one dry ingredient of the caramel on the outside surface of an edible core.”

It is the Examiner’s position that the caramel layer of Given et al. is defined by both the caramel and nut layers. While Given et al. disclose distinct caramel and nut layers (C5/L34-68), it necessarily follows that the combination of the two layers is still a caramel layer or caramel product.

11. Applicants’ arguments with respect to claim 11 under 35 C.F.R. 103(a) have been considered but are moot in view of the new ground(s) of rejection.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to ELIZABETH GWARTNEY whose telephone number is (571)270-3874. The examiner can normally be reached on M-F.

If attempts to reach the examiner by telephone are unsuccessful, the examiner’s supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/E. G./
Examiner, Art Unit 1781

/Keith D. Hendricks/
Supervisory Patent Examiner, Art Unit 1781